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No. SC92553

IN THE

Supreme Court of Missouri

CHARLES R. GARRIS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Warren County Circuit Court
Twelfth Judicial Circuit
The Honorable Keith M. Sutherland, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Mr. Garris appeals the denial of his Rule 24.035 motion. In his motion, Mr. Garris alleged two claims (L.F. 8). Both claims were denied without an evidentiary hearing (L.F. 19).

Mr. Garris alleged first that his "constitutional rights to a jury trial under the Sixth Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution were violated when the [trial] Court denied (pre-plea) Movant's motion titled 'Defendant's Constitutional Challenge To Section 558.018.5(2)' " (L.F. 8). Mr. Garris's "constitutional challenge" alleged that the trial court should not have made factual findings regarding his status as a "predatory sexual offender" because those factual findings increased the minimum punishment he would be subjected to and, thus, under *Apprendi* and its progeny, those facts should have been submitted to the jury for determination.

He alleged second that his "constitutional rights to due process (specifically procedural due process as applied to him) under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution were violated when the [trial] Court, on April 11, 2011, denied (pre-plea) Movant's motion titled 'Defendant's Procedural Due Process Objection To Section 558.021.2' " (L.F. 8). Mr. Garris's "objection" to § 558.021 alleged that the trial court should not have held the "predatory sexual

offender" hearing before trial commenced or before Mr. Garris pleaded guilty.

* * *

On November 30, 2010, the state filed an information charging Mr. Garris with three counts of statutory sodomy in the first degree, § 566.062, RSMo 2000 (L.F. 53). Count I alleged that the victim was less than twelve years old; thus, the range of punishment was life imprisonment or a term of years not less than ten years (L.F. 53; *see* § 566.062.2, RSMo 2000). Counts II and III alleged that the victim was less than fourteen years old; thus, the range of punishment was life imprisonment or a term of years not less than five years (L.F. 53; *see* § 566.062.2, RSMo 2000).[1]

On December 7, 2010, the state filed an amended information (L.F. 57). The amended information alleged the same offenses, but it included the allegation that Mr. Garris was a "predatory sexual offender" (L.F. 57-58). To prove that Mr. Garris was a predatory sexual offender, the state alleged that it would prove that Mr. Garris had committed a prior, unadjudicated sexual offense against a child, S.D. (L.F. 57-58). As a predatory sexual offender, the range of punishment for all three offenses was "life imprisonment, with the court to set the minimum time required to be served before eligibility for

[1] The information incorrectly stated "less than three (3) years" on Counts II and III (L.F. 55).

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parole, conditional release or other early release, which minimum time shall be not less than ten years" (L.F. 57-58). On March 29, 2011, the state gave notice that, on April 11, 2011, it intended to prove that Mr. Garris was a predatory sexual offender (L.F. 59).

On April 8, 2011, Mr. Garris filed a "Procedural Due Process Objection to Section 558.021.2" (L.F. 43). The motion pointed out that a jury trial had been scheduled for April 26, 2011, and the motion alleged that allowing the state to present its proof of "predatory sexual offender" status before the jury trial would be "prejudicial to the defendant" and "violate defendant's procedural due process rights" (L.F. 62-63). The motion alleged that "in keeping with the spirit of Section 558.021.2," the predatory sexual offender hearing could be held "before voir dire, during a lunch recess or the jury instruction conference," or after the court recessed for the evening if the trial lasted more than one day (L.F. 64). The trial court overruled this "procedural due process objection" on April 11, 2011, before the state proved Mr. Garris's status as a predatory sexual offender (L.F. 24, 43, 76).

Also on April 11, 2011, the state filed a second amended information (L.F. 74-75). The amendment changed the date range of the unadjudicated offense that qualified Mr. Garris as a predatory sexual offender (L.F. 74-75).

That same day, Mr. Garris filed a "Constitutional Challenge to Section 558.018.5(2)" (L.F. 65). Citing *Ring v. Arizona*, 536 U.S. 584 (2002), Mr.

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Garris asserted that "the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination [under § 558.018.5(2), RSMo regarding 'predatory sexual offender]' be entrusted to the jury" (L.F. 65). The motion also cited *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the well-settled proposition that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (L.F. 68). The motion ultimately asserted that the holding of *Apprendi* should be "modified" to state that "[a]ny fact that increases the penalty for a crime beyond the prescribed statutory *minimum* must be submitted to a jury and proved beyond a reasonable doubt[.]" (L.F. 71). The motion alleged in the alternative that § 558.018.5(2) should be declared unconstitutional under the jury trial guarantee of the federal and state constitutions (L.F. 71). The trial court took the motion under advisement (L.F. 43, 77).

The state then presented evidence that Mr. Garris was a predatory sexual offender (L.F. 24). At that hearing, the victim of Mr. Garris's prior unadjudicated offense, S.D., testified (L.F. 24). (A transcript of the predatory sexual offender hearing has not been included in the record on appeal.) The trial court found Mr. Garris to be a predatory sexual offender (L.F. 17, 82).

On April 22, 2011, the state filed a third amended information (L.F.

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78). This amendment removed the predatory sexual offender allegation as to Count II (L.F. 78-79).[2] At that time, the trial court denied Mr. Garris's constitutional challenge to § 558.018.5(2) (L.F. 45, 80). Mr. Garris then pleaded guilty to all three charged offenses (L.F. 24, 44-45). (A transcript of the guilty plea hearing has not been included in the record on appeal.) According to the motion court's findings and conclusions, the record at the plea hearing established the following.

> The State alleged, and [Mr. Garris] agreed, that all of the victims were relatives of his, and that when D.G.A. (D.O.B. 5-27-1997) was approximately five years old, [Mr. Garris] began asking her if he could touch her vagina. At that time, D.G.A. did not know it was wrong, so she allowed him to do so. Between August 28, 2002 and May 27, 2005, [Mr. Garris] repeatedly touched D.G.A.'s vagina with his hand at his home. When D.G.A. was approximately eight years old, she realized it was wrong for him to touch her. It was at that time she told him he could not touch

[2] Earlier, based on the fact that the "predatory sexual offender" designation did not exist at the time of the offense alleged in Count II, Mr. Garris had filed a "Motion to Dismiss Count II's Allegation of Predatory Sexual Offender" (L.F. 43).

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her anymore.

> When A.G. (D.O.B. 6-22-1982) was six years old, [Mr. Garris] began touching her vagina. A.G. lived with [Mr. Garris], and he would typically tuck her into bed at night. When he tucked her in, he would insert his finger into her vagina. He did this almost every night until A.G. was eleven years old.
>
> When L.C. (D.O.B. 6-26-1992) was five years old, [Mr. Garris] began asking her if he could touch her vagina. L.C. stayed at [Mr. Garris's] house during the summertime and after she received dialysis. [Mr. Garris] inserted his finger in L.C.'s vagina on a weekly basis when L.C. was at his house. This continued until L.C. was thirteen years old.

(L.F. 18).

After pleading guilty, Mr. Garris waived a sentencing assessment report, and the trial court sentenced him to three concurrent life sentences (L.F. 18, 44, 81-82). On Counts I and III, because Mr. Garris was a predatory sexual offender, the trial court ordered that he serve fifteen years before becoming eligible for parole or other early release (L.F. 82).

On October 20, 2011, Mr. Garris filed a post-conviction motion pursuant to Rule 24.035 (L.F. 1, 7-9). The motion asserted two claims: first, that Mr. Garris's "constitutional rights to a jury trial under the Sixth

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Amendment to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution were violated when the [trial] Court denied (pre-plea) Movant's motion titled 'Defendant's Constitutional Challenge To Section 558.018.5(2);" and second, that his "constitutional rights to due process (specifically procedural due process as applied to him) under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution were violated when the [trial] Court, on April 11, 2011, denied (pre-plea) Movant's motion titled 'Defendant's Procedural Due Process Objection To Section 558.021.2' " (L.F. 8).

On April 24, 2012, the motion court denied Mr. Garris's post-conviction motion without holding an evidentiary hearing (L.F. 17-21). In denying Mr. Garris's challenge to the constitutionality of § 558.018.5(2), the motion court first observed that this Court had upheld the constitutionality of that statute in *State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998) (L.F. 19-20). The motion court also concluded that "by pleading guilty, [Mr. Garris] waived any challenge to the matters set forth in his motion" (L.F. 20).

In denying the challenge to the constitutionality of § 558.021.2, the motion court concluded that "[t]he statute does not require those facts [showing the defendant to be a predatory sexual offender] to be proven nor the Court to make a finding that a defendant is a predatory sexual offender on the same day that a jury is empanelled" (L.F. 34). The motion court also

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concluded that "by pleading guilty, [Mr. Garris] waived any challenge to the matters set forth in his motion" (L.F. 35).

On April 27, 2012, Mr. Garris filed his notice of appeal (L.F. 27).

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ARGUMENT

I.

The motion court did not clearly err in denying Mr. Garris's claim that § 558.018.5(2) is unconstitutional under *Apprendi* and its progeny.

Mr. Garris asserts in Point I that § 558.018.5(2) is unconstitutional because it (in combination with the provisions of § 558.021) allowed the trial judge in his case to make factual findings about a prior unadjudicated offense in support of its conclusion that Mr. Garris was a "predatory sexual offender" (App.Br. 23-27, 30-32). Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and other cases applying *Apprendi*, Mr. Garris asserts that the trial court's fact-finding violated his right to jury fact-finding (App.Br. 23-27, 30-32).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

"Whether a statute is constitutional is reviewed *de novo*." *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012). "Statutes are presumed

constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id.*

" 'The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations.' " *Id.* (quoting *Franklin Cnty. ex rel. Parks v. Franklin Cnty. Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008)). " '[I]f it is at all feasible to do so, statutes must be interpreted to be consistent with the constitutions.' " *Id.* (quoting *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992)). " 'If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted.' " *Id.* (quoting *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007)).

B. The motion court's findings and conclusions

In denying the challenge to the constitutionality of § 558.018.5(2), the motion court first observed that this Court had upheld the constitutionality of that statute in *State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998) (L.F. 19-20). The motion court also concluded that "by pleading guilty, [Mr. Garris] waived any challenge to the matters set forth in his motion" (L.F. 20). The motion court did not clearly err in denying Mr. Garris's claim.

C. Mr. Garris waived this claim by pleading guilty

Mr. Garris argues that he did not waive this claim because he abided by the general rule that a constitutional violation must be raised at the first

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opportunity or it is waived (App.Br. 21, citing, *e.g.*, *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998)). He points out that he lodged his objection to the statute on the day of the predatory sexual offender hearing; thus, he asserts that his objection was timely (App.Br. 22). He also points out that he included his challenge to the constitutionality of § 558.018.5(2) in his Rule 24.035 motion (App.Br. 22).

But while Mr. Garris took some steps to preserve his claims, he pleaded guilty, and there is nothing in the record to suggest that his guilty plea was conditional, or that the waiver that normally accompanies a guilty plea was limited so as to allow Mr. Garris to later challenge the constitutionality of § 558.018.5(2) on the grounds that the trial court's fact-finding violated his right to jury fact-finding. In most cases, for instance, a defendant is advised that by pleading guilty the defendant waives the right to jury trial. *See State v. Craig*, 287 S.W.3d 676, 679 (Mo. banc 2009) (stating that "a guilty plea serves as a waiver of any challenge to the merits of the underlying conviction," and pointing out that the waiver is binding in light of the information that must be imparted to the defendant pursuant to Rule 24.02).

The general rule is that a voluntary and intelligent guilty plea waives all non-jurisdictional defects and defenses, including constitutional claims. *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010); *see State v. Vogt*, 304 S.W.3d 209, 212 (Mo.App. W.D. 2009) ("a defendant who pleads guilty 'waives

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all claims of error except those affecting the voluntariness of the plea or the understanding with which the plea was made.' ") (quoting *Pettis v. State*, 212 S.W.3d 189, 193 (Mo.App. W.D.2007)). Here, because a transcript of the guilty plea hearing has not been included in the record on appeal, it is not apparent what sort of information was provided to Mr. Garris at the time of his plea. It was Mr. Garris's obligation to preserve his claim. Here, in asserting that the motion court clearly erred in finding a waiver, Mr. Garris has not explained why his voluntary and intelligent guilty plea should not operate to waive alleged constitutional errors that preceded the guilty plea.

It has long been recognized that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 259 (1973). In *Tollett*, for example, the defendant alleged in a federal habeas petition that his constitutional rights had been violated because African-Americans had been excluded from the grand jury that indicted him. The Court rejected the claim, concluding, "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 267.

Here, the alleged constitutional error—the alleged usurpation of the jury's role as factfinder—occurred before Mr. Garris pleaded guilty. If Mr.

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Garris had wanted to maintain his claim that he was entitled to jury fact finding, he should have requested to enter a conditional plea premised on his ability to subsequently pursue his constitutional challenge. *See generally State v. Craig*, 287 S.W.3d at 677-678 (holding that the defendant's guilty plea did not waive a claim challenging a sentencing enhancement where the trial court and the parties "agreed to a bifurcated proceeding in which the court would accept [the defendant's] guilty plea and then hold a hearing about the issue of whether his sentence was subject to enhancement").

Even if Mr. Garris's pre-plea efforts were sufficient to preserve this claim and survive the waiver that normally accompanies a guilty plea, or in the event that the Court is not satisfied that a waiver of Mr. Garris's *Apprendi* claim was valid (*see generally Blakely v. Washington*, 542 U.S. 296, 310 (2004) (. . . nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.")), Mr. Garris is not entitled to relief because the predatory sexual offender statutes did not violate Mr. Garris's right to jury fact-finding.

D. The motion court did not clearly err in denying Mr. Garris's constitutional challenge to § 558.018.5(2)

Under § 558.021.1(3), in cases where the state alleges that a defendant

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is a "predatory sexual offender," the trial court must make "findings of fact that warrant a finding beyond a reasonable doubt . . . that the defendant is a . . . predatory sexual offender." § 558.021.1(3), RSMo 2000. "In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing[.]" § 558.021.2, RSMo 2000. "In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but prior to sentencing." § 558.021.3, RSMo 2000.

When a person is found to be a predatory sexual offender, the person "shall be imprisoned for life with eligibility for parole[.]" § 558.018.6, RSMo 2000. Additionally, "the court shall set the minimum time required to be served before a predatory sexual offender is eligible for parole, conditional release or other early release by the department of corrections." § 558.018.7, RSMo 2000. And when a person is found to be a predatory sexual offender pursuant to § 558.018.5(2)—as was Mr. Garris in this case—the minimum time served "shall be any number of years within the range to which the person could have been sentenced pursuant to the applicable law if the person was not found to be a predatory sexual offender." § 558.018.7(5).

Applying these provisions to Counts I and III in Mr. Garris's case did not increase the range of punishment that Mr. Garris was subjected to by pleading guilty. (Mr. Garris was ultimately not charged as a predatory sexual

offender on Count II.) Without the predatory sexual offender enhancement, Mr. Garris would have been subject to the following punishments:

- Count I, statutory sodomy in the first degree (victim less than twelve years old)—life imprisonment or a term of years not less than ten years (or, in other words, ten years to an unlimited number of years). § 566.062.2, RSMo 2000.
- Count III, statutory sodomy in the first degree (victim less than fourteen years old)—life imprisonment or a term of years not less than five years (or five years to an unlimited number of years). § 566.062.2, RSMo 2000).

As a predatory sexual offender, Mr. Garris was subject to the following:

- Count I—life imprisonment, with parole eligibility set by the court from ten to an unlimited number of years.
- Count III—life imprisonment, with parole eligibility set by the court from five years to an unlimited number of years.

As is evident, the mandatory sentence of life imprisonment for a predatory sexual offender did not exceed the authorized range of punishment for Mr. Garris's offenses. Rather, by limiting the trial court's discretion to a life sentence, the legislature merely took away the lower and higher ranges of punishment—*i.e.*, the legislature increased the minimum sentence to life imprisonment and took away the court's discretion to impose, for example,

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100-year sentences.

Permitting judge fact-finding under such circumstances does not run afoul of *Apprendi* and its progeny. In *Apprendi*, a New Jersey statute classified the possession of a firearm for an unlawful purpose as a "second-degree" offense. *Apprendi*, 530 U.S. at 468. The offense was punishable by imprisonment "between five years and 10 years." *Id*. A separate "hate crime" statute provided for an "extended term" of imprisonment if the trial judge found by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id*. at 468-469. The extended term of imprisonment was "between 10 and 20 years." *Id*. at 469.

The question presented to the Court was whether the Due Process Clause of the Fourteenth Amendment required that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt. *Id*. After discussing historical sources and prior case law, the Court ultimately concluded, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. Accordingly, the Court concluded that "[t]he New Jersey procedure

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challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id*. at 497.

Other cases decided after *Apprendi* have reiterated and applied the *Apprendi* rule in various circumstances. *See*, *e.g.*, *Southern Union Co. v. United States*, 132 S.Ct. 2344, 2357 (2012) (holding that *Apprendi* applied to fact that increased a criminal fine); *Oregon v. Ice*, 555 U.S. 160, 167-171 (2009) (holding that *Apprendi* did not apply to the decision whether to impose concurrent or consecutive sentences); *Cunningham v. California*, 549 U.S. 270, 281, 288-289 (2007) (holding that *Apprendi* applied to facts permitting the imposition of an "upper term" sentence under California'a determinate sentencing law); *Blakely v. Washington*, 542 U.S. 296, 304-305 (2004) (holding that *Apprendi* did apply to facts allowing a sentence that exceeded the "standard" range of punishment); *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002) (holding that *Apprendi* did apply to facts subjecting the defendant to the death penalty).

With the exception of *Oregon v. Ice* (which held that *Apprendi* did not apply), all of these cases dealt with fact-finding conducted by the trial court that allowed the trial court to impose a longer prison sentence or greater criminal fine. In such cases, the trial court's action in imposing a greater sentence ran afoul of *Apprendi* because "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on*

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the basis of the facts reflected in the jury verdict or admitted by the defendant" (emphasis in original). *Blakely v. Washington*, 542 U.S. at 303.

Here, by contrast, the trial court's fact-finding did *not* permit the trial court to impose a prison sentence that was longer than the sentence the trial court would have been able to impose if Mr. Garris had pleaded guilty without the prior finding that he was a predatory sexual offender. In fact, for one of his offenses (Count II, in which Mr. Garris was not charged as a predatory sexual offender), the trial court imposed a sentence of life imprisonment solely on the basis of facts admitted by Mr. Garris when he pleaded guilty (L.F. 81-82). In short, because a life sentence was authorized after a plea of guilty to the offenses charged in Counts I and III, the trial court's fact finding in this case did not run afoul of *Apprendi*.

In *Apprendi*, the Court indicated that sentencing within the range of punishment does not implicate the constitutional principles discussed in that case. The Court observed, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U.S. at 481. "We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case." *Id*. Thus, here, because the predatory sexual offender

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statute merely limited the trial court's discretion in imposing sentence, it did not run afoul of *Apprendi*.

In a case decided after *Apprendi*, the Court held that *Apprendi* did not apply to fact-finding that increased the minimum punishment for an offense. In *Harris v. United States*, 536 U.S. 545, 550 (2002), the defendant "sold illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side." A federal statute provided for a minimum sentence of five years (with no maximum). *Id.* at 550-551. But if the defendant brandished the firearm during the crime, the minimum sentence increased to seven years. *Id.* at 551. If the defendant discharged the firearm, the minimum sentence increased to ten years. *Id.* at 551. After a bench trial, the trial court found by a preponderance of the evidence that the defendant had brandished his gun, and the court sentenced the defendant to seven years. *Id.*

The defendant claimed an *Apprendi* violation, but the lower court found that it was permissible for the trial court to make its finding by a preponderance of the evidence because the "brandishing" aspect of the crime was merely a "sentencing factor." *Id.* at 552. The United States Supreme Court granted certiorari and affirmed the lower court. *Id.*

The Court first examined whether Congress had made "brandishing an element [of the offense] or a sentencing factor[.]" *Id.* (Elements of an offense must be proved beyond a reasonable doubt, whereas sentencing factors can be

proved by a preponderance of the evidence.) The Court first observed that the structure of the statute suggested that brandishing was a sentencing factor. *Id*. The Court observed that the statute described a complete crime and then added facts related only to the minimum sentence. *Id*. The Court also observed that brandishing appeared to be a sentence enhancement because it did not provide for a "steeply higher" penalty. *Id*. at 554. The Court observed that "the required findings constrain, rather than extend, the sentencing judge's discretion." *Id*.

The Court then considered whether *Apprendi* required that every fact that increases a minimum punishment must be submitted to the jury and proved beyond a reasonable doubt. *Id*. at 555-557. The Court concluded that it did not:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.

Id. at 557. (That part of the Court's opinion was a plurality opinion, but the

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concurring judge expressed agreement with that proposition. *See Harris v. United States*, 536 U.S. at 569-570 ("I therefore join the Court's judgment, and I join its opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.") (Breyer, J., concurring).)

The plurality opinion further observed that "the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings." *Id*. at 567. "It is critical not to abandon that understanding at this late date." *Id*. "Legislatures and their constituents have relied upon *McMillan*[*v. Pennsylvania*, 477 U.S. 79 (1986)] to exercise control over sentencing through dozens of statutes like the one the Court approved in that case." *Id*. at 567-568 (citing statutes that have conditioned mandatory minimum sentences upon judicial findings that a firearm was possessed, brandished, or discharged; that the victim was over 60 years of age; that the defendant possessed a certain quantity of drugs; that the victim was related to the defendant; and that the defendant was a repeat offender).

As in *Harris v. United States*, the predatory sexual offender statutes do not increase the length of sentence that the trial court may impose after a finding of guilt or guilty plea. Rather, the predatory sexual offender statutes serve to "constrain, rather than extend" the trial court's discretion. It is true that they also allow the trial court to order a minimum term before parole

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eligibility or other early release, but placing limits on parole eligibility or other early release does not expose the defendant to a penalty exceeding the maximum he could have received after conviction. Moreover, the rule of *Apprendi* should not be expanded to encompass factual findings related to parole eligibility or other early release, as such decisions are "not within the jury function that 'extends down centuries into the common law.' " *See Oregon v. Ice*, 555 U.S. 160, 168 (2009) (quoting *Apprendi* and concluding, "The decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law.' "). *See generally Cardenas v. State*, 231 S.W.3d 835, 837 (Mo.App. W.D. 2007) (recognizing established precedent that "it is not error for the trial court to fail or refuse to inform the jury [concerning issues of parole eligibility]" because such issues are " 'considered extraneous to the jury's determination of guilt and punishment.' ").

Mr. Garris points out, correctly, that a State cannot avoid *Apprendi*'s rule by simply labeling certain factual findings "sentencing factors" instead of "elements" of the offense (App.Br. 25-27). Thus, in addition to examining whether a fact increases the range of punishment (and, thus, must be submitted to the jury and proved beyond a reasonable doubt according to *Apprendi*), courts may also be called upon to determine whether a factual finding is, in fact, an element of the offense that must be submitted to the

jury and found beyond a reasonable doubt. In other words, even when a particular fact increases the minimum punishment that a defendant can be subjected to, the United States Supreme Court has held that if the necessary fact is an "element" of the offense, then it must be submitted to the jury and found beyond a reasonable doubt. *See United States v. O'Brien*, 130 S.Ct. 2169, 2172 (2010) (examining the issue of "whether the fact that the firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt or a sentencing factor to be proved to the judge at sentencing," and concluding that it was an element).

In *O'Brien*, the Court first noted the rule announced in *Apprendi* and stated that "while sentencing factors may guide or confine a judge's discretion in sentencing an offender '*within the range* prescribed by statute,' [] judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury" (or admitted by the defendant). *Id.* at 2174-2715 (citation omitted). The Court then stated that "[s]ubject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing fact is a question for Congress." *Id.* at 2175. "When Congress is not explicit, . . . courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor." *Id.*

Here, as discussed above, the predatory sexual offender statutes do not

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run afoul of *Apprendi* because they do not increase the range of punishment. The question, then, is whether predatory sexual offender status is an element of the offense or a sentencing factor. In short, it is a sentencing factor.

The Missouri Legislature has made plain that a defendant's status as a "predatory sexual offender" is merely a sentence enhancement. The statutes are contained in Chapter 558, which is entitled "Imprisonment." The predatory sexual offender designation can apply to many different offenses, and the relevant subsection defines when a court must "sentence" a person "to an extended term of imprisonment[.]" § 558.018.4, RMSo 2000. This statutory language is sufficiently explicit to conclude that the legislature intended the predatory sexual offender status to act as a sentencing factor.

Even if the statutory language were deemed insufficient to explicitly designate the predatory sexual offender status as a sentencing factor, a review of the various considerations set forth in *O'Brien* confirms that the predatory sexual offender designation is a sentencing factor under Missouri law. In *O'Brien*, the Court "examined five factors directed at determining congressional intent: (1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history." *O'Brien*, 130 S.Ct. at 2175.

Here, the language and structure of the relevant statutes favor the conclusion that the predatory sexual offender designation is a sentencing

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factor. The offense that Mr. Garris pleaded guilty to—statutory sodomy in the first degree—is defined in § 566.062, and it makes no reference to predatory sexual offender status. Moreover, as stated above, predatory sexual offender is defined in a different chapter—Chapter 558, Imprisonment. *Cf. O'Brien*, 130 S.Ct. 2175-2176 (the offense and the machinegun enhancement were defined in the same statute).

History also favors the conclusion that the predatory sexual offender designation is a sentencing factor. "Sentencing factors traditionally involve characteristics of the offender—such as recidivism, cooperation with law enforcement, or acceptance of responsibility." *Id*. at 2176. Here, the predatory sexual offender designation involves the characteristics of the defendant. *Cf. id*. ("Characteristics of the offense itself are traditionally treated as elements, and the use of a machinegun under § 924(c) lies 'closest to the heart of the crime at issue.' ").

The third factor is potential unfairness. In *O'Brien*, the Court examined this factor by pointing out that, in an earlier case, the Court had expressed concern about allowing the judge to make factual findings where there might have been uncertain issues of fact relating to guilt. *Id*. at 2177. The Court stated that "[t]he concern was that the judge may not know which weapon the jurors determined a defendant used, and 'a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say,

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the pistol, might conflict with the jury's belief that he actively used the pistol.' " *Id*. But no similar concerns exist here. The evidence that supported the trial court's finding that Mr. Garris was a predatory sexual offender did not involve the same conduct as the charged offenses. Moreover, the statutes that permit the trial court to make the relevant findings require specific pleadings, proof beyond a reasonable doubt, and other procedural safeguards (*e.g.*, "full rights to confrontation and cross-examination, with the opportunity to present evidence). *See* § 558.021, RSMo 2000.

The one factor that weighs in favor of concluding that the predatory sexual offender designation is an element is "the severity of the sentence accompanying a finding" of predatory sexual offender status. *See O'Brien*, 130 S.Ct. at 2177 (an increase of the minimum sentence from five years to thirty years was "a drastic, sixfold increase that strongly suggests a separate substantive crime"). For one of Mr. Garris's crimes (Count III), the finding changed the minimum sentence from five years to life imprisonment. For the other crime (Count I), the minimum increased from ten years to life imprisonment. Those were significant increases, but it must be remembered that "life imprisonment" was also a specifically authorized sentence for either offense, even without the predatory sexual offender finding. *See* § 566.062.2, RSMo 2000. In fact, as stated above, on Count II, Mr. Garris was sentenced to life imprisonment, even though he was not charged as a predatory sexual

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offender on that count (L.F. 81-82). Moreover, a sentence of life imprisonment for statutory sodomy in the first degree (for a defendant who is not a predatory sexual offender) is not an unheard-of sentence. *See State v. Greenlee*, 327 S.W.3d 602, 607 (Mo.App. E.D. 2010); *State v. Dixon*, 70 S.W.3d 540, 542 (Mo.App. W.D. 2002); *State v. Galindo*, 973 S.W.2d 574, 575 (Mo.App. S.D. 1998). *Cf. O'Brien*, 130 S.Ct. at 2177 ("Neither the Government nor any party or amicus has identified a single defendant whose conviction under § 924 for possessing or brandishing a nonspecific firearm led to a sentence approaching the 30-year sentence that is required when the firearm is a machinegun.").

The final factor is legislative history, but there is little legislative history to consider, aside from the legislature's decision to include the predatory sexual offender designation in the statute where it defined another type of recidivist, namely, the "persistent sexual offender." *See* § 558.018.2, RSMo 2000. The relevant statute also follows § 558.016, RSMo 2000, which defines various other types of recidivists.

Overall, the factors outlined above compel the conclusion that the "predatory sexual offender" designation is a sentence enhancement and not an element of the offense of statutory sodomy in the first degree. As such, and because the factual finding did not increase the range of punishment, it was proper for the trial court to make the determination that Mr. Garris was a

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predatory sexual offender.

E. The statute of limitations for Mr. Garris's unadjudicated offense against S.D. did not bar the state from using the prior offense to support its predatory sexual offender allegation

As part of his argument, Mr. Garris asserts that because his previously unadjudicated crime against S.D. was outside the statute of limitations, the State should not have been permitted to use that conduct to support its charge that Mr. Garris was a predatory sexual offender (App.Br. 27-30). He argues that "if an act does not fall within the statute of limitations, as with [Mr. Garris's] case, it nonetheless can bypass the Sixth Amendment's jury trial guarantee and be used to obtain a guaranteed sentence of life imprisonment with eligibility for parole" (App.Br. 30).

But because Mr. Garris was neither charged with, nor punished for, his prior offense against S.D., this argument is without merit. In *State v. Gilyard*, 979 S.W.2d 138, 142 (Mo. banc 1998), the defendant argued that "the predatory sexual offender act violates due process and equal protection." The defendant claimed that he was "being punished for a crime for which he did not receive a jury trial." *Id*. The Court rejected the claim and observed that if the defendant "were being punished for the [previously unadjudicated] assault, then he would have a right to a jury trial on that offense." *Id*.

Similarly, here, if Mr. Garris were being convicted and punished for his

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previous, unadjudicated sexual offense against S.D., the statute of limitations would prohibit the prosecution. But Mr. Garris was not being punished for his previous offense; rather, he was being punished for the charged offenses, and the trial court merely considered evidence of the previous, unadjudicated offense in determining the appropriate sentence. *See generally State v. Bascue*, 485 S.W.2d 35, 38 (Mo. 1972) (rejecting the defendant's claim that evidence of uncharged acts should not have been admitted because the uncharged acts were outside the statute of limitations: "The difficulty with this contention is that appellant was not 'tried, or prosecuted or punished' for the prior offenses. [The statute] imposes no restriction on the admission in evidence of offenses barred by the limitation statutes."); *see also Gilyard*, 979 S.W.2d at 143 ("Sentencing courts have traditionally 'not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.' "). This point should be denied.

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II.

The motion court did not clearly err in denying Mr. Garris's claim that § 558.021.2 was unconstitutional as applied to him.

Mr. Garris asserts in Point II that § 558.021.2 was unconstitutional as applied to him because the plain language of that statute did not permit the trial court to hold a predatory sexual offender hearing until one of the "triggering events" named in the statute—a jury trial, a bench trial, or a plea of guilty—had occurred (App.Br. 36). He asserts that this timing error violated his right to procedural due process (App.Br. 33).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

"Whether a statute is constitutional is reviewed de novo." *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012). "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id.*

" 'The person challenging the validity of the statute has the burden of

proving the act clearly and undoubtedly violates the constitutional limitations.' " *Id.* (quoting *Franklin Cnty. ex rel. Parks v. Franklin Cnty. Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008)). " '[I]f it is at all feasible to do so, statutes must be interpreted to be consistent with the constitutions.' " *Id.* (quoting *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992)). " 'If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted.' " *Id.* (quoting *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007)).

B. The motion court's findings and conclusions

In denying the challenge to the constitutionality of § 558.021.2, the court concluded that "[t]he statute does not require those facts [showing the defendant to be a predatory sexual offender] to be proven nor the Court to make a finding that a defendant is a predatory sexual offender on the same day that a jury is empanelled" (L.F. 34). The court also concluded that "by pleading guilty, [Mr. Garris] waived any challenge to the matters set forth in his motion" (L.F. 35). The motion court did not clearly err.

C. Mr. Garris waived this claim by pleading guilty

As in Point I, Mr. Garris argues that he did not waive this claim because he abided by the general rule that a constitutional violation must be raised at the first opportunity or it is waived (App.Br. 37, citing, *e.g.*, *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998)). He points out

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that he lodged his objection to § 558.021.2 before he was found to be a predatory sexual offender; thus, he asserts that his objection was timely (App.Br. 38). He also points out that he included his challenge to the constitutionality of § 558.021.2 in his Rule 24.035 motion (App.Br. 38-39).

But while Mr. Garris took some steps to preserve his claims, he pleaded guilty, and there is nothing in the record to suggest that his guilty plea was conditional, or that the waiver that normally accompanies a guilty plea was limited so as to allow Mr. Garris to later challenge the constitutionality of § 558.021.2 on the grounds that the trial court's actions violated his right to procedural due process. In most cases, for instance, a defendant is advised that by pleading guilty the defendant waives the right to jury trial. *See State v. Craig*, 287 S.W.3d 676, 679 (Mo. banc 2009) (stating that "a guilty plea serves as a waiver of any challenge to the merits of the underlying conviction," and pointing out that the waiver is binding in light of the information that must be imparted to the defendant pursuant to Rule 24.02).

The general rule is that a voluntary and intelligent guilty plea waives all non-jurisdictional defects and defenses, including constitutional claims. *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010); *see State v. Vogt*, 304 S.W.3d 209, 212 (Mo.App. W.D. 2009) ("a defendant who pleads guilty 'waives all claims of error except those affecting the voluntariness of the plea or the understanding with which the plea was made.' ") (quoting *Pettis v. State*, 212

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S.W.3d 189, 193 (Mo.App. W.D.2007)). Here, because a transcript of the guilty plea hearing has not been included in the record on appeal, it is not apparent what sort of information was provided to Mr. Garris at the time of his plea. It was Mr. Garris's obligation to preserve his claim. Here, in asserting that the motion court clearly erred in finding a waiver, Mr. Garris has not explained why his voluntary and intelligent guilty plea should not operate to waive alleged constitutional errors that preceded the guilty plea.

Here, the alleged constitutional error—the allegedly ill-timed predatory sexual offender hearing—occurred before Mr. Garris pleaded guilty. If Mr. Garris had wanted to maintain his claim that he was entitled to that hearing on the day of his trial (or after some other triggering event), he should have requested to enter a conditional plea premised on his ability to subsequently pursue his constitutional challenge. *See generally State v. Craig*, 287 S.W.3d at 677-678 (holding that the defendant's guilty plea did not waive a claim challenging a sentencing enhancement where the trial court and the parties "agreed to a bifurcated proceeding in which the court would accept [the defendant's] guilty plea and then hold a hearing about the issue of whether his sentence was subject to enhancement").

Even if Mr. Garris's pre-plea efforts were sufficient to preserve this claim and survive the waiver that normally accompanies a guilty plea, Mr. Garris is not entitled to relief because the predatory sexual offender statutes

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did not violate Mr. Garris's right to procedural due process.

D. The motion court did not clearly err in denying Mr. Garris's constitutional challenge to § 558.021.2

"The due process clauses of the United States and Missouri constitutions prohibit the taking of life, liberty or property without due process of law." *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. banc 2007). "The United States Supreme Court has long recognized that this prohibition 'imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests.' " *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). "In determining what process is due in a particular case, a court first determines whether the plaintiff has been deprived of a constitutionally protected liberty or property interest." *Id.* "If so, a court then examines whether the procedures attendant upon the deprivation of that interest were constitutionally sufficient." *Id.*

Under § 558.021, the trial court has authority to make findings of fact that warrant a finding that the defendant is a predatory sexual offender. § 558.021.1(3), RSMo 2000. The statute also provides that, generally, "[i]n a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing[.]" § 558.021.2, RSMo 2000. "In a trial without a jury or upon a plea of guilty, the court may defer the proof and

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findings of such facts to a later time, but prior to sentencing." § 558.021.3, RSMo 2000.

Mr. Garris asserts that under the plain language employed by the statute, it was not permissible for the trial court to hold a predatory sexual offender hearing before his jury or bench trial began or before he pleaded guilty (App.Br. 35-36). He argues that by holding his predatory sexual offender hearing before trial began, the trial court essentially added the phrase "or at any time prior to a jury trial" to § 558.021.2 (App.Br. 35).

But Mr. Garris's reading of the statutory language is far too narrow. Subsections 2 and 3 provide basic guidelines to follow in three situations: (1) cases that are resolved through a jury trial, (2) cases that are resolved through a bench trial, and (3) cases that are resolved through a plea of guilty. In the first instance—a jury trial—the predatory sexual offender hearing must be held (in most cases) "prior to submission to the jury outside of its hearing." The time period of "prior to submission to the jury" necessarily includes any time before the jury is empanelled; thus, holding the hearing before trial did not deprive Mr. Garris of his procedural due process rights.

In fact, subsection 2 ultimately did not directly apply in Mr. Garris's case because he elected to plead guilty. Thus, the hearing had to be held according to the timing requirements of subsection 3. Subsection 3 obtains some meaning from subsection 2 because it allows the hearing to be deferred

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to "a later time, but prior to sentencing." § 558.021.3, RSMo 2000. The deferred-to-a-later-time provision must be read in conjunction with subsection 2, and it plainly means that the hearing can be held at any time allowed by subsection 2 or after submission to the jury "but prior to sentencing." *See* § 558.021.2-.3, RSMo 2000. Thus, because Mr. Garris pleaded guilty, it was proper to hold his predatory sexual offender hearing any time before sentencing. This point should be denied.

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CONCLUSION

The Court should affirm the denial of Mr. Garris's Rule 24.035 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 8,218 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief, along with a copy of this brief, was sent through the Missouri eFiling System on this 22nd day of October, 2012, to:

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